Supreme Court, U.S.
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In The

Supreme Court of the United States

PHELPS DODGE CORPORATION, ARIZONA PUBLIC SERVICE COMPANY, GILA VALLEY IRRIGATION DISTRICT, AND FRANKLIN IRRIGATION DISTRICT,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona law?

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SUPPLEMENTAL STATUTORY PROVISIONS INVOLVED IN THE CASE

Arizona Revised Statutes (A.R.S.) § 45-251 provides, in pertinent part:

> 1. "General adjudication" means an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source.
>
> * * *
>
> 3. "Person" means an individual, a partnership, a corporation, a municipal corporation, the state of Arizona or any political subdivision, the United States of America, an Indian tribe or a community or any other legal entity, public or private.
>
> * * *
>
> 7. "River system and source" means all water appropriable under § 45-141 and all water subject to claims based upon federal law.

STATEMENT OF THE CASE

I. HISTORY OF ARIZONA GROUNDWATER LAW

In *Maricopa County Municipal Water Conservation District v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931), the Arizona Supreme Court addressed the issue of underground water. The Arizona Court drew a distinction between subflow, which it held to be appropriable under Arizona's prior appropriation laws, and percolating water, which it held not to be appropriable. The Court

did not, however, provide a definition of or distinction between subflow and percolating waters.

The Arizona Court considered and rejected one set of definitions of subflow and percolating water in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993) (*"Gila River II"*). In that decision, the Arizona Court acknowledged that this bifurcated system of water rights – surface vs. groundwater – was not hydrologically sound.

> As scientific knowledge progressed, most states revised their water laws to provide for unitary management of hydraulically connected underground and surface water. Arizona, however, did not, and continues to adhere to a bifurcated system of water rights, with compelling implications for general stream adjudications.

175 Ariz. at 386, 857 P.2d at 1240. The Arizona Court went on to note: "[W]e recognize that the line between surface and groundwater drawn by the Southwest Cotton court and reaffirmed by this court today is, to some extent, artificial and fluid." 175 Ariz. at 392, 857 P.2d at 1246.

The terms *subflow* and *percolating water*, for purposes of Arizona's bifurcated system, were again defined by the trial court and have again been taken to the Arizona Supreme Court on interlocutory review. The Arizona Court has received briefs and, in December of 1999, heard oral arguments.

In 1948, the Arizona Legislature adopted the Groundwater Act, which authorized the creation of critical

groundwater areas. In 1952, in *Bristor v. Cheatham*, 73 Ariz. 228, 240 P.2d 185 (*"Bristor I"*), the Arizona Supreme Court reversed *Southwest Cotton* and determined that percolating groundwater was appropriable. Upon rehearing, following a change in the composition of the court, the Arizona Supreme Court reversed *Bristor I* and readopted the *Southwest Cotton* rule on non-appropriation of percolating groundwater. *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953) (*"Bristor II"*).

In 1980, the Arizona Legislature enacted the Groundwater Management Act and repealed the 1948 Groundwater Act. The Groundwater Management Act created active management areas ("AMAs") and irrigation non-expansion areas. The 1980 Groundwater Management Act was ruled constitutional in *Town of Chino Valley v. City of Phoenix*, 131 Ariz. 78, 638 P.2d 1324 (1981) (*"Chino Valley II"*). Therein, the Arizona Supreme Court held that "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water." 131 Ariz. at 82, 638 P.2d at 1328.

In *Cherry v. Steiner*, 543 F. Supp. 1270, 1280 (1982), the United States District court examined the extent of the Groundwater Management Act's coverage.

> It established four AMA's, which account for 69 percent of the State's groundwater overdraft and 80 percent of the State's population. The three AMA's with safe yield goals account for 45 percent of the overdraft and 77 percent of the population in Arizona. The Arizona Department of Economic Security has forecasted that the

State's population will explode most profoundly in the area encompassed by the Phoenix, Tucson and Prescott AMA's.

II. HISTORY OF THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

In 1919, the Arizona Legislature adopted a procedure for the determination of conflicting water rights, which was amended in 1928 and 1939. *See* A.R.S. §§ 45-231 through 45-245 (repealed 1979). That procedure was conducted before the Arizona State Land Department in an administrative hearing, was limited to prior appropriation water rights, involved the rights of streams or water supplies but not entire river systems and sources, and did not address federal reserved rights.

General Water-Rights Adjudication in Arizona: Yesterday, Today and Tomorrow, 27 Ariz. Law Rev. 709 n. 2, 1985, set forth the early history of Arizona's general water adjudications:

> On April 26, 1974, the Salt River Valley Water Users' Association (SRVWUA), invoking Arizona's statutory stream adjudication procedure, filed a petition with the Arizona State Land Department to determine conflicting rights to the use of water in the Salt River above Granite Reef Dam, east of Phoenix and excluding the Verde River. SRVWUA filed a similar petition for the Verde River and its tributaries on February 28, 1976. On February 17, 1978, Phelps Dodge Corporation filed two petitions with the State Land Department: one determining the conflicting rights to the Gila River, and the other

> determining the conflicting rights to the Little Colorado River.

The Arizona Supreme Court further described the history of these general water adjudications in *United States v. Superior Court of Arizona*, 144 Ariz. 265, 270, 697 P.2d 658, 663 (1985):

> In 1979 the [Arizona State Land] Department advised various claimants of the pending petition and required that claims be filed pursuant to A.R.S. Section 45-232. Petitioners [San Carlos Apache Tribe, Tonto Apache Tribe, and the United States] were among the claimants so notified. Later that year several Indian tribes, including the petitioners, filed actions in the United States District Court for the District of Arizona, seeking a declaration of rights with respect to the issues raised in the proceeding before the Arizona State Land Department. Within two months after that filing, the state legislature repealed the former act (Sections 45-231 to 45-245) and replaced it with the present statute (article 6, Title 45, Arizona Revised Statutes, consisting of Sections 45-251 to 45-260 and entitled "General Adjudication of Water Rights").

A number of Arizona Indian Tribes brought actions in District Court, requesting relief from state administrative water adjudications. The parties to *In the Matter of the Determination of Conflicting Rights to the Use of Water From the Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (1980), included the Salt River Valley Water Users' Association, the Phelps Dodge Corporation, the State of Arizona, the Gila River Indian Community, the San Carlos Apache Tribe, and numerous other Arizona Indian Tribes.

On January 18, 1980, the District Court remanded the actions to state court or dismissed them, without prejudice, based on the applicability of the McCarran Amendment. 43 United States Code (U.S.C.) § 666. The tribes had contended that the State adjudication was not a McCarran Amendment proceeding because the Arizona water rights determination law deliberately excluded non-Indian uses of percolating groundwater. After an analysis of the *Winters* Doctrine, *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908), and the applicable Arizona state law, the District Court concluded:

> Section 45-251(5), Arizona Revised Statutes, which effectively sets forth the scope of the State proceedings, defines the phrase "river system and source" as "(A)ll water appropriable under (A.R.S.) Section 45-101 and all water subject to claims based upon federal law."
>
> Thus, the State proceedings will determine federal reserved rights (including federal reserved rights to percolating groundwater) and rights to water appropriable under State law. The only water rights excluded from the State proceeding are those rights to percolating groundwater arising solely under existing Arizona case law.

484 F. Supp. at 784.

The District Court's decision was appealed to the Ninth Circuit Court of Appeals in *San Carlos Apache Tribe of Arizona v. State of Arizona*, 668 F.2d 1093 (1982). The Ninth Circuit reversed the District Court's decision based upon its determination that Arizona's Enabling Act prohibited jurisdiction over Indians in State water adjudications, the McCarran Act not withstanding. Other issues,

including adjudication of groundwater claims, were not decided.

The Ninth Circuit decision was appealed to this Court in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S. Ct. 3201, 7 L.Ed. 2d 837 (1983). This Court reversed and remanded the case indicating that, because of the unique nature of water rights adjudications and the uniqueness of the McCarran Amendment, it had been proper for the District Court to defer to the state court proceedings.

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source has now been in litigation for over twenty years. The current opinion, 989 P.2d 739 (1999) (*"Gila River III"*), reflects the sixth appearance of this general stream adjudication before the Arizona Supreme Court. In this action, the Arizona Court answered two interlocutory questions:

> Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona Law? (Interlocutory Issue 4)
>
> Are federal reserved rights holders entitled to greater protection from groundwater pumping than are water users who hold only state law rights? (Interlocutory Issue 5)

The Arizona Supreme Court answered both questions affirmatively. No petition for a writ of certiorari was taken as to Interlocutory Issue 5.

ARGUMENT:

THERE IS NO COMPELLING REASON TO GRANT CERTIORARI. CERTIORARI SHOULD BE DENIED.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion," and a petition for certiorari will be granted only for compelling reasons. Rule 10, Rules of the Supreme Court of the United States. There are no compelling reasons for the Court to grant this Petition.

I. THERE IS NO SUBSTANTIAL OR IMPORTANT FEDERAL QUESTION THAT MUST BE ANSWERED BY THIS COURT.

Over the years, this Court has used a number of phrases to describe its criteria for accepting a petition for a writ of certiorari. Whether the Court requires "special and important reasons," that the issue be "substantial in character," that the issue involve an "important federal question," or that the petition contain a "compelling reason," the rationale is the same – the Court will not use its limited resources to make determinations that do not have a significant and material impact.

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special important reasons' imply a reach to a problem beyond the academic or the episodic.

* * *

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 79, 75 S. Ct. 614, 616, 619-620, 99 L. Ed. 897 (1955).

This Petition for a Writ of Certiorari does not involve an issue of importance to the nation as a whole, to other state or federal courts, or to the vast majority of the citizens or water users in Arizona.

A. THE ARIZONA SUPREME COURT DECISION, AS TO INTERLOCUTORY ISSUE 4, TURNS ON THE COURT'S INTERPRETATION OF UNIQUE ARIZONA WATER LAW AND THE PETITION RAISES NO ISSUE OF NATIONAL IMPORTANCE.

Water law varies widely from state to state – with individual peculiarities depending on the hydrology, geology, water needs, and the legal and hydrologic history of the particular state. Eastern and midwestern states tend to use various theories of riparian law. Western states tend to employ various theories of prior appropriation law. A number of states utilize a combination of riparian and prior appropriation water law principles. Individual states have detailed statutes or common law rules dealing with surface water use, underground water

use, or combined water use. Each state has its own statutory or common law rules for dealing with disputes between competing water users.

"Conforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface waters and undertaken unitary management of water supplies." *Gila River III*, 989 P.2d at 744. Arizona has not undertaken a unitary management of water supplies, and has a bifurcated system that divides water into appropriable water (surface water and underground water designated as subflow) and non-appropriable water (underground water designated as percolating water) that the Arizona Court acknowledges is "an artifice . . . that rests on a hydrological misconception." *Gila River III*, 989 P.2d at 743.

There is no validity to Petitioners' claim that the "[t]he opinion below, if adopted as precedent in other states, will result in conflicts with state laws governing allocation and management of groundwater throughout the United States." Petition, page 26. No other state has Arizona's unique blend of water laws – including prior appropriation, a bifurcated underground water system, and administrative regulation of some but not all percolating waters – and Arizona's specific statute dealing with general adjudications of water rights.

State courts recognize their own independence in making rulings concerning their distinctive state laws. As the Georgia Court of Appeals noted: "[T]he decisions of other jurisdictions are not binding on this Court and will be followed only when they are determined to be consistent with the orderly and fair development of the law of

this state." *State Farm Fire & Casualty Co. v. American Hardware Mutual Insurance Co.*, 224 Ga. App. 789, 792, 482 S.E.2d 714, 717 (1997).

The Arizona Supreme Court determination, as to Interlocutory Issue 4, was based on its detailed analysis of Arizona's general adjudication statutes and the interrelationship of that law to Arizona groundwater law. The Arizona Court wrote:

> The City of Phoenix argues that our general adjudication statute permits us to adjudicate federal water claims only to the extent that they are claims to water that is appropriable under state law, and, thus, that we lack jurisdiction to consider whether federal reserved rights extend to non-appropriable groundwater. We summarily reject this argument because it is contrary to the plain, conjunctive definitional language of A.R.S. § 45-251(4) and because such an interpretation would deprive this adjudication of the comprehensive quality that our general adjudication statute was intended to provide.

Gila River III, 989 P.2d at 744 n. 5.

The Arizona Supreme Court, in this and other rulings on the Gila River Adjudication, has studied the history of Arizona's statutes governing the general adjudication of water rights. Prior to 1979, Arizona had a statute for determination of conflicting water rights that was administrative rather than judicial, was limited to state prior appropriation rights, and did not consider federal rights. *See* A.R.S. §§ 45-231 through 45-245 (repealed 1979).

In 1979, a number of Indian tribes filed actions arguing, among other things, that the state system for determination of conflicting water rights did not comply with the McCarran Amendment because it did not provide for the adjudication of Indian rights to percolating groundwater. *See Granite Reef Dam,* 484 F. Supp. 778. Two months after the Indians brought these actions, the Arizona Legislature abolished its existing water rights determination process and adopted a totally new process that defined a general adjudication as a judicial determination of the rights of all persons (including Indian tribes) to use water in any river system and source. *See* A.R.S. § 45-251(1) and (3). The Arizona Legislature defined *river system and source* as "all water appropriable under § 45-141 and all water subject to claims based upon federal law." *See* A.R.S. § 45-251(7). Following the adoption of these statutes, the District Court either remanded the Indian cases back to state court, or dismissed them without prejudice, because "the State proceedings will determine federal reserved rights (including federal reserved rights to percolating groundwater)." *Granite Reef Dam,* 484 F. Supp. at 784.

The Arizona Supreme Court has correctly determined that the Arizona Legislature intended to include Indian water rights to percolating groundwater in its general water rights adjudication statutes.

> Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state.

Johnson v. Frankell, 520 U.S. 911, 916, 117 S. Ct. 1800, 1894, 138 L. Ed. 2d 108 (1997).

The Arizona Court having interpreted the Arizona statutes as including federal rights to percolating groundwater, such "state interpretation is as though written into the ordinance itself." *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 765, 97 L. Ed. 1105 (1953). *See also Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 838, 98 S. Ct. 1535, 1541, 56 L. Ed. 2d 1 (1978).

In *Reitman v. Mulkey*, 387 U.S. 369, 378-379, 87 S. Ct. 1627, 1633, 18 L. Ed. 2d 830 (1967), this Court reviewed a specific California statute and stated:

> Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of s 26 and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discrimination to an unconstitutional degree. We accept this holding of the California Court.

Here, the Arizona Supreme Court, armed with knowledge of the facts and circumstances concerning Arizona's unique groundwater laws and unique general water rights adjudication statutes, recognized that Arizona's laws on percolating groundwater are hydrologically unsound. It further considered that the Arizona Legislature amended statutes in response to certain federal court claims concerning percolating groundwater and that, based on the statutes' adoption, the federal court claims were remanded or dismissed.

The Arizona Supreme Court recognizes that "blind devotion to federal interpretation is not required; we

need not follow the federal cases if we believe Arizona policy, practice, or case law requires a different result." *Richie v. Grand Canyon Scenic Rides*, 165 Ariz. 460, 464, 799 P.2d 801, 805 (1990). Yet, based upon its intricate knowledge of Arizona's unique laws and unique hydrology, the Arizona Court determined that the Arizona statutes give Arizona courts the jurisdiction to adjudicate the rights of Indian and other federal reservations to percolating groundwater. Pursuant to its reasoning in *Reitman*, this Court should refuse to grant this Petition for a Writ of Certiorari.

Because of the complex factual and legal history surrounding the determination as to Interlocutory Issue 4, this case does not present a good vehicle for this Court's review. First, neither the Petitioners, nor any other landowners/water users, have any "right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and the right of the owner of the overlying land is simply to the usufruct of the water." *Chino Valley II*, 131 Ariz. at 82, 638 P.2d at 1328. Thus, there is no need to consider any federal question because, under Arizona's local laws, Petitioners have no rights of ownership to the groundwater.

In addition, this case and this issue have been ongoing for over twenty years. Based on the actions filed in *Granite Reef Dam*, the Arizona Legislature completely altered its process for water rights determinations. Based on the Arizona Legislature's actions, the District Court remanded the Indian claims back to state court because "the State proceedings will determine federal reserved rights (including federal reserved rights to percolating groundwater)." 484 F. Supp. at 784. The Salt River Valley

Water Users' Association, Phelps Dodge Corporation, and the State of Arizona, as well as the Gila River Indian Community and the San Carlos Apache Tribe, were all parties to that litigation. Whether the decision is based on res judicata, collateral estoppel, judicial estoppel, law of the case, or simply a realization that this has been the state of the law on this issue in this proceeding for twenty years, there is no reason for this Court to accept jurisdiction now.

B. THE ARIZONA SUPREME COURT DECISION, AS TO INTERLOCUTORY ISSUE 4, DOES NOT IMPACT ON THE VAST MAJORITY OF ARIZONA'S CITIZENS.

Petitioners are incorrect in their claim that the determination of Issue 4 will adversely affect millions of Arizona's citizens. In actuality, Issue 4 will have a very narrow impact. The Arizona Court noted, "some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping underground water." *Gila River III*, 989 P.2d at 746. The Arizona Court also wrote: "A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." 989 P.2d at 748. Thus, the federal reservations that *might* have water rights, under Issue 4, are those reservations that do not have surface water resources available to them and have not had surface resources in the past. The water basins subject to Issue 4 represent only 1% of Arizona's current population – less than 20,000 people – and only 2% of current water use. *See* Appendices A-3 and A-4.

The Arizona Court's decision, with regard to Interlocutory Issue 5, indicates that holders of federal reserved water rights enjoy greater protection from groundwater pumping than do holders of state law rights. As in this Court's decision in *Cappaert v. United States*, 426 U.S. 128, 143, 96 S. Ct. 2062, 2071, 48 L. Ed. 2d 523 (1976), Issue 5 deals with the ability of a federal reservation to "protect its water from subsequent diversion, whether the diversion is of surface or groundwater." Appendices A-2 through A-4 are based on the Arizona Department of Water Resources' *Arizona Water Resources Assessment* of August 1994, which divided the state into a number of water basins based upon similar hydrology. Interlocutory Issue 5 will affect those water basins that contain a federal reservation that has or would have, but for upstream development and depletion, surface water resources available. Issue 5 will also affect water basins without a federal reservation but which are hydrologically connected to basins with a federal reservation. Issue 5 does have the potential to impact on lands that encompass 87% of the current water use and 97% of the current population of Arizona. Issue 5, however, was not appealed.

II. THE ARIZONA SUPREME COURT DECISION, AS TO INTERLOCUTORY ISSUE 4, DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT.

A. THE ARIZONA SUPREME COURT DECISION REQUIRES CONSIDERATION OF THE PURPOSES OF EACH SPECIFIC FEDERAL RESERVATION.

Petitioners are incorrect when they claim that Interlocutory Issue 4 conflicts with this Court's decision in

Winters v. United States, 207 U.S. 564, by finding a federal reserved right to groundwater without considering the purposes of any specific reservation. The Arizona Court unequivocally stated:

> We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

Gila River III, 989 P.2d at 748.

B. THE ARIZONA SUPREME COURT DECISION COMPLIES WITH THE GUIDELINES OF *UNITED STATES v. KIMBELL FOODS.*

While Respondent does not believe that a *Kimbell Foods* analysis was necessary, the Arizona Supreme Court did not, as alleged by the Petitioners, fail to apply the test of *United States v. Kimbell Foods*, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979), when it made its analysis of the applicability of federal law to the rights of federal reservations to groundwater.

Kimbell Foods, 440 U.S. at 728, 99 S. Ct. at 1458, analyzed situations in which there is a need for a nationally uniform body of law. The Arizona Court specifically considered the issues discussed in *Kimbell Foods*, noting first that

> in order to adjudicate water rights based upon federal law, the Arizona courts must afford federal claimants the benefit, when state and federal law conflict, of federal substantive law. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983).
>
> * * *
>
> [T]he Supreme Court has defined the reserved rights doctrine as an exception to Congress's deference to state water law. See United States v. New Mexico, 438 U.S. 696, 714, 98 S. Ct. 3012, 75 L. Ed. 2d 1052 (1978) . . . see also United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703, 19 S. Ct. 770, 43 L. Ed. 1136 (1899) (state law cannot be applied to destroy the federal government's right to water on its lands).

Gila River III, 989 P.2d at 744-745, 747.

Pursuant to *Kimbell Foods*, the Arizona Court considered whether the application of state law on percolating water would frustrate specific objectives of federal programs. The Arizona court stated:

> Where federal rights are at issue, a state court may adopt state law as the rule of decision if to do so would not frustrate or impair a federal purpose. See United States v. Kimbell Foods, Inc. 440 U.S. 715, 728-29, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979). *Such is not the case here.* [Emphasis added.]

Gila River III, 989 P.2d at 747.

After extensive analysis of how groundwater pumping could interfere with the present and future water rights of Indian and other federal reservations, the Arizona Court determined:

> We therefore cannot conclude that deference to Arizona's law – and to the opportunity it extends all landowners to pump as much groundwater as they can reasonably use – would adequately serve to protect federal rights.

Gila River III, 989 P.2d at 748.

Kimbell Foods also discussed the need to consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. 440 U.S. at 729, 99 S.Ct. at 1459. The Arizona Court considered this issue in detail:

> We recognize that our determination that reserved water rights may encompass groundwater threatens to disrupt the assumptions that underlie state law uses. State law parties may question how our present holding may be squared with our decision in Gila River II to retain Arizona's traditional bifurcation of the law of surface and groundwater. We are no less cognizant now than when we decided Gila River II that Arizona's agricultural, industrial, mining and urban interests have accommodated themselves to the framework of Southwest Cotton. [Citation omitted.] Yet there long has loomed the need – sometimes noted, sometimes wished away – for those same interests also to accommodate themselves to the water claims of the vast federal land holdings that surround them. [Citation omitted.] For state law purposes in Gila River II, we found reason to retain a bifurcated framework despite the hydrological misconceptions upon which it rested. But federal law does not permit us that option in deciding the extent of federal reserved rights. As Leshy

> and Belanger wrote in summary of Cappaert, "For federal law, the question is one of hydrology, not legal compartmentalization." 20 Ariz. St. L.J. at 734.
>
> We do not underestimate the burden that the State of Arizona will face in accommodating federal reserved water rights within its water resource management. Nor do we underestimate the burden that the trial court will face in adjudicating the extent and relative priority of such rights. Unless there is a comprehensive settlement, however, we must heed the lesson that "the best way out is always through." To solve the conflict and uncertainty that reserved rights engender, we must quantify them, for we may not ignore them.

Gila River III, 989 P.2d at 750.

The Arizona Court considered every element listed in *Kimbell Foods* and determined that the Arizona water rights adjudication statutes and Arizona water law made percolating groundwater available, when necessary, to fulfill federally reserved water rights.

C. THE ARIZONA SUPREME COURT DECISION INTEGRATES FEDERAL GROUNDWATER RIGHTS WITH EXISTING ARIZONA LAW.

Petitioners are incorrect in their claim that the Arizona Court's decision, as to Interlocutory Issue 4, fails to integrate federal groundwater rights with existing state groundwater law. The Arizona Court carefully and comprehensively integrated such groundwater rights; it simply did so in a manner disapproved of by the Petitioners.

The Arizona Court analyzed and rejected Petitioners' claim that Indian and other federal reserved water rights could be protected by nondiscriminatory access to a shared resource. The Arizona Court explained:

> A theoretically equal right to pump groundwater, in contrast to a reserved right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers. Cf. Washington v. Washington State Com. Passenger Fishing Vessel Ass'n, 433 U.S. 658, 676 n. 22, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979) ("[I]n light of the far superior numbers, capital resources, and technology of the non-Indians, the concept of the Indians' 'equal opportunity' to take advantage of a scarce resource is likely in practice to mean that the Indians' 'right of taking fish' will net them virtually no catch at all.")

Gila River III, 989 P.2d at 748.

The Arizona Court did not, as alleged by Petitioners, "guarantee a supply of water to federal reservations." Petition, page 17. The Arizona Court specifically stated:

> We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation.

Gila River III, 989 P.2d at 748.

The Arizona Court also specifically stated that the right of a federal reservation to protect its groundwater from subsequent diversion is limited to "the extent such protection is necessary to fulfill its reserved right," and

found that the reserved right is "only that amount necessary to fulfill the purpose of the reservation, no more." *Gila River III*, 989 P.2d at 750.

Petitioners are also incorrect in their allegation that the Arizona court has extended the *Winters* Doctrine "on heretofore unrecognized principles of general federal common law." Petition, page 17. The Arizona Court applied the law, as it has existed for the last thirty years, and considered the uniform federal decisions recognizing a federally reserved water right to groundwater, including *Tweedy v. Texas Co.*, 786 F. Supp. 383 (D. Mont. 1968), *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660 (1986), and *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974).

III. THERE IS NO REAL OR INTOLERABLE CONFLICT BETWEEN THE LOWER COURTS.

This Court has stated:

> Certiorari is granted . . . only in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and . . . where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

National Labor Relations Board v. Pittsburgh S. S. Co., 340 U.S. 498, 502, 71 S. Ct. 453, 456, 95 L. Ed. 479 (1951).

A. THERE IS NO CONFLICT BETWEEN THE FEDERAL COURTS AND THE ARIZONA SUPREME COURT.

The decision of the Arizona Court, as to Interlocutory Issue 4, is consistent with all federal court decisions that have made a determination as to the applicability of the *Winters* or federal reserved water rights doctrine to groundwater. The District Court for the District of Montana examined this issue, in 1968, in *Tweedy v. Texas Company*, 786 F. Supp. at 385, stating:

> The Winters case dealt only with the surface rights, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid – water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.

The Ninth Circuit Court of Appeals also examined this issue in *United States v. Cappaert*, 508 F.2d at 317:

> The Cappaerts contend, however, that the doctrine of implied reservation of water does not apply to groundwater, but only to surface water. Although these Supreme Court cases involved only surface water rights, the reservation of water doctrine is not so limited.
>
> Two cases in the Ninth Circuit approved the application of the doctrine of implied reservation of groundwater when water was needed to accomplish the purpose of the reservation. Nevada ex rel. Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960); Tweedy v.

> Texas Co., 286 F. Supp. 383 (D. Mont. 1968). In our view the United States may reserve not only surface water, but also underground water.

The United States Claims Court stated, in *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. at 699, that "[g]round water under the Gila River reservation impliedly was reserved for the Indians." The District court for the District of Washington held that *Winters* or federally reserved water rights "extend to groundwater as well as surface water." *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1326 (1978). *See also State of New Mexico v. Aamodt*, 618 F. Supp. 993 (D.N.M. 1985). In *Granite Reef Dam*, the Arizona District Court also held that the *Winters* or federal reserved water rights doctrine extended to groundwater, and then made an independent finding that the determination of the rights of Indian and other federal reservations to percolating groundwater was required by the Arizona general water rights adjudication statutes.

Respondents found no federal case holding that the *Winters* doctrine does *not* extend to groundwater. Having cited no such case, it may be presumed that the Ninth Circuit Court of Appeals, the United States District Courts for the Districts of Montana, Washington, New Mexico and Arizona, the Arizona Supreme Court, and the Petitioners also found no such case.

Petitioners are incorrect in their claim that the Arizona Court has somehow created federal common law. The Arizona Supreme Court did not extend the *Winters* doctrine. Rather, the Arizona Court applied *Winters v. United States* in conformity with all of the existing federal court opinions that have examined the issue of reserved

rights to groundwater. The Arizona Court was correct in its determination as to Interlocutory Issue 4, under federal law as well as under the law of the State of Arizona.

B. THERE IS NO SIGNIFICANT CONFLICT BETWEEN STATE SUPREME COURTS.

The mere existence of a difference of opinion between two state supreme courts is not a sufficient reason for this Court to grant a petition for writ of certiorari. There is no significant or compelling conflict between the opinions of the Arizona Supreme Court and the Wyoming Supreme Court. There is no "real and embarrassing conflict of opinion and authority" that requires this Court's time and review. As noted earlier, state laws governing surface and underground waters, and judicial recognition of the right to use those waters, vary widely from state to state. The State of Wyoming does not have the same water laws as the State of Arizona. The fact that two state supreme courts, examining an issue in light of their own state laws, might come to differing conclusions is hardly a basis for intervention by this Court. Other state courts can and will take both the Arizona Court decision in *Gila River III*, and the Wyoming Court's decision in *In re the General Adjudication of All Rights to Use Water in the Big Horn System*, 753 P.2d 76 (1988), for what they are – interesting opinions that may or may not be persuasive in light of the individual state's water laws. It would not be a proper utilization of this Court's resources to serve as a "super nanny" for the purpose of regulating state court interpretation of state water law.

Proof of the ability of the individual states to make an independent analysis, as to the issue of federal reserved water rights and groundwater, is found in the Arizona Court's determination of Interlocutory Issue 4. After carefully considering the Wyoming Court's decision in *Big Horn*, the Arizona Court wrote:

> [T]he Supreme Court of Wyoming recognized that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." [Citation omitted.] Yet the court declined to find a reserved right to groundwater, stating in explanation only that it had been cited no previous decision which did so. [Citation omitted.]
>
> We can appreciate the hesitation of the Big Horn court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so.

Gila River III, 989 P.2d at 745.

Petitioners are incorrect in their claim that the decision of the Supreme Court of Montana, in *Confederated Salish and Kootenai Tribes v. Clinch*, 56 Mont. 1356, 992 P.2d 244 (1999), demonstrates some "uncertainty" over the issue of reserved rights in groundwater. Quite the opposite, that opinion demonstrates that other state supreme courts are able to read and consider both the decision of the Supreme Court of Wyoming and the Supreme Court of Arizona and, then, to make their own independent decisions based on the unique facts and laws of their states. It is also important to note that the Montana District Court had already ruled, thirty years earlier, that

the reserved rights doctrine applied to underground as well as surface waters. *See Tweedy v. Texas Company*, 786 F. Supp. 383.

Justice Stevens, writing concerning the denial of certain petitions for writs of certiorari, advised:

> I believe that the further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. During the past five years, two state supreme courts have [come to differing conclusions concerning prosecutors' use of peremptory challenges]. . . . [M]y judgment is it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by the Court.

McCray v. New York, 461 U.S. 961, 961, 103 S. Ct. 2438, 2438-2439, 77 L. Ed. 2d 1322 (1983).

Here, there appears to be no federal court decision that differs from the Arizona Supreme Court's determination on Interlocutory Issue 4. The only differing state supreme court decision indicated that it agreed with the logic that the Arizona Supreme Court used as the basis for the Arizona decision, but was unwilling to be the first to address the issue. Therefore, there is no real or significant conflict between the nation's courts that requires this Court's intervention.

IV. THE ISSUES BEFORE THE ARIZONA SUPREME COURT, CONCERNING INTERLOCUTORY ISSUE 4, ARE TOO PRELIMINARY TO WARRANT REVIEW BY THIS COURT.

While a state or federal court decision may be sufficiently final to meet the jurisdictional requirements for a writ of certiorari, the decision may be too uncertain or preliminary to warrant this Court's granting such petition. That is the situation in this case. It is important, of course, to point out that the Arizona Court's determination as to Issue 4 is interlocutory. It is more important to note the factors in the decision itself which evidence the Arizona Supreme Court's recognition that neither it, nor the trial court, is finished with this issue – and that further proceedings will be necessary to determine whether Interlocutory Issue 4 will ever have a real effect on any Indian or other federal reservation, or on any non-federal water user.

The Arizona Court wrote:

> For the foregoing reasons, we hold that the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater. We decide this issue in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters

> necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

Gila River III, 989 P.2d at 739.

In a footnote, the Arizona Court reiterated that "[u]ntil federal rights are quantified, it cannot be determined which if any of the tribes are entitled to such relief." 989 P.2d at 749 n. 12. The Arizona Court also noted that its decision on the definition of subflow (Interlocutory Issue 2, briefed and argued but not yet decided) could conceivably be broad enough to protect the rights of some or all of the federal reservations. 989 P.2d at 749. The decision on Interlocutory Issue 2 also affects whether Interlocutory Issue 4 will ever have a real-world effect.

At this time, no one knows if this issue is simply an interesting academic question that will never have an actual application. This Court should refuse to grant the Petition for Writ of Certiorari until it has been determined that the ruling actually affects some specific federal reservation and some actual non-federal water user.

The Arizona Supreme Court also recognized that questions of the effectiveness of the Arizona Groundwater Management Code must be answered before a determination can be made as to whether Interlocutory Issue 4 would have any impact in the case of a specific reservation. The Arizona Court wrote:

> We similarly approach [rejecting as premature] the state law parties' argument that federal reserved rights holders may be adequately protected against groundwater depletion by the 1980 Groundwater Management Code, which

> restricts application of the reasonable use doctrine and mandates conservation measures in some parts of Arizona. . . . Whether any particular reservation receives adequate protection of its reserved water rights through the combination of Arizona's common and statutory law remains to be determined.

Gila River III, 989 P.2d at 749 n. 13.

Until the specific facts concerning individual reservations have been analyzed in light of the provisions of the Arizona Groundwater Management Code, the Arizona Court's ruling on Interlocutory Issue 4 remains a matter of academic interest, without a current real-world application.

V. CONCLUSION

There are no compelling reasons that would justify granting the Petition for a Writ of Certiorari filed herein. Therefore, the Gila River Indian Community respectfully requests that the Court deny this Petition.

Respectfully submitted,

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EXPLANATORY DATA

The Arizona Department of Water Resources ("ADWR") divided the state into a number of water basins in its *Arizona Water Resources Assessment of August 1994*. The ADWR water basins are based on interrelated hydrology – surface and underground water – within distinct land areas. The size and shape of a water basin is determined by the geology of the region.

The Arizona Department of Water Resources *Assessment*, Volume I, *Inventory and Analysis*, August 1994, pages 13, 14, 139, 141, 153, 155, 173, 175, 192, and 194, provided the data for the water basin map, the water basin designation, the population data per water basin, and the water supply data per water basin. Population figures of less than 100 people were rounded up to 100. Water use figures of less than 1000 acre-feet were rounded up to 1000 acre-feet.

A determination was made as to whether a particular ADWR water basin contained federal reserved lands (federal lands that have been designated as a federal reservation, such as an Indian Reservations, Military Reservations, National Parks, National Monuments, etc.). Bureau of Land Management lands that have not been designated as federal reservations, with potential *Winters*/reserved water rights, were not considered.

The ADWR water basins that are shaded purple contain federal reservations that have surface water resources available to them, or would have had surface water resources available but for upstream and/or neighboring development and depletion. If an ADWR water basin has or had surface water resources, and is upstream

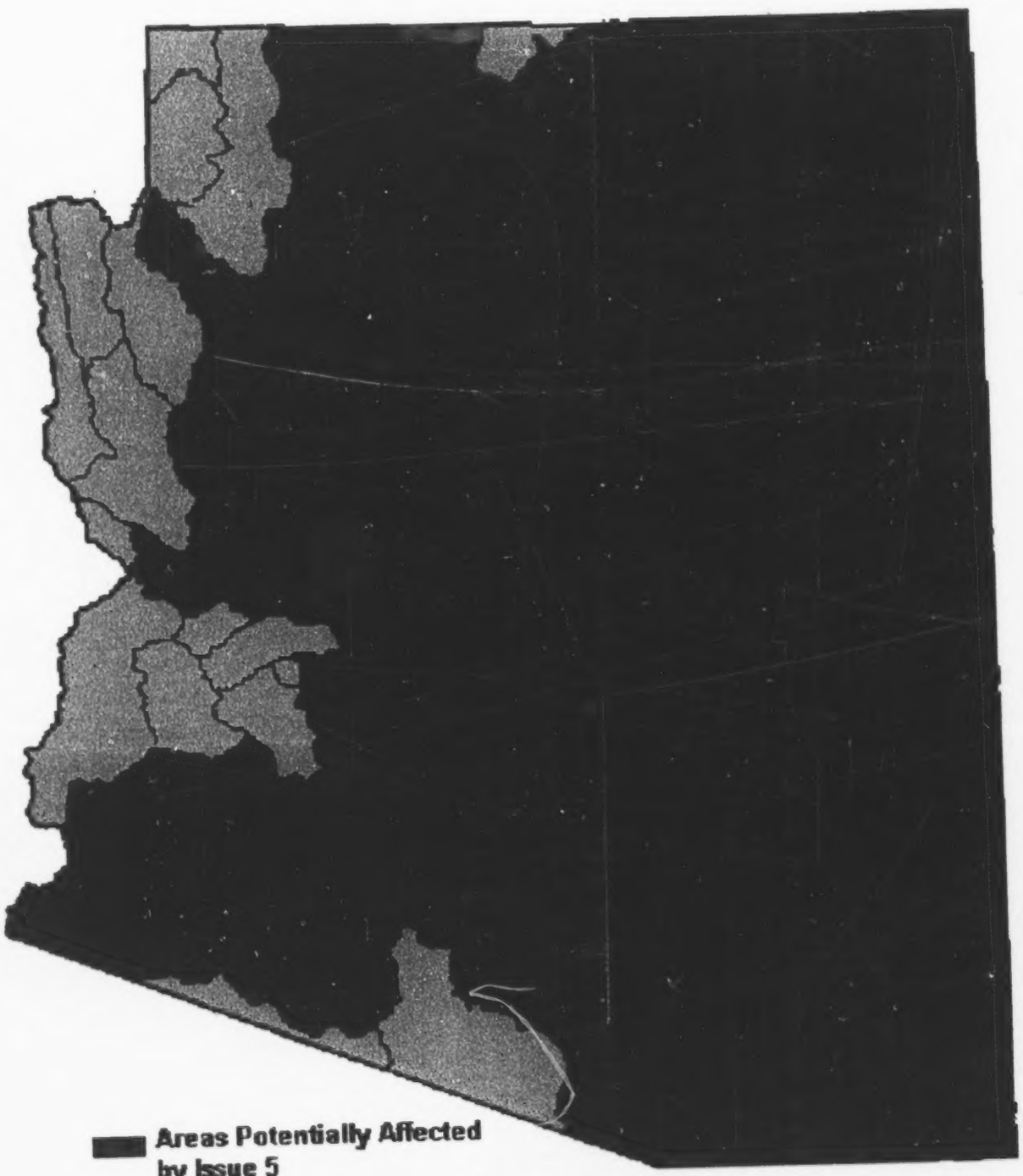
from a federal reservation that has or had surface water resources available to it, then this water basin is also shaded purple. An exception was made for any ADWR water basin that was 100% federal land, and was not upstream from another basin. [This water basin designation does not attempt to determine whether any of the federal reservations have any actual water rights. It only designates that the water basin does or did contribute to surface water that was or is available for use by the federal reservations, if such a water use right should be determined to exist.] ADWR water basins that contain federal reservations with actual or potential surface water resources provided from the Colorado River were not designated as purple because their water rights are governed by *Arizona v. California,* 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963). The ADWR water basins that are shaded purple are subject to the Arizona Supreme Court determination on Interlocutory Issue 5; *i.e.,* that federal reserved rights holders are entitled to greater protection from groundwater pumping than are water users who hold only state law rights.

The ADWR water basins that are shaded green contain federal reservations that do not have surface water resources available to them, and did not have such resources available in the past. For these federal reservations, underground water is the only water resource available. If an ADWR water basin consisted totally of a federal reservation, it was not shaded green. The ADWR water basins that are shaded green are subject only to the Arizona Supreme Court determination on Interlocutory Issue 4; *i.e.,* that federal reserved water rights extend to groundwater (underground water) that is not subject to

prior appropriation under Arizona law. The water basins that are shaded green have no water resources available that would be subject to the Arizona Supreme Court's determination on Interlocutory Issue 5.

The ADWR water basins that are shaded yellow do not have a federal reservation and are not upstream of a federal reservation or, if they do have a federal reservation, that federal reservation's water use rights are governed by *Arizona v. California,* or are totally federally-owned.

Potential Impact of Issues 4 and 5 On Arizona's Hydrologic Regions



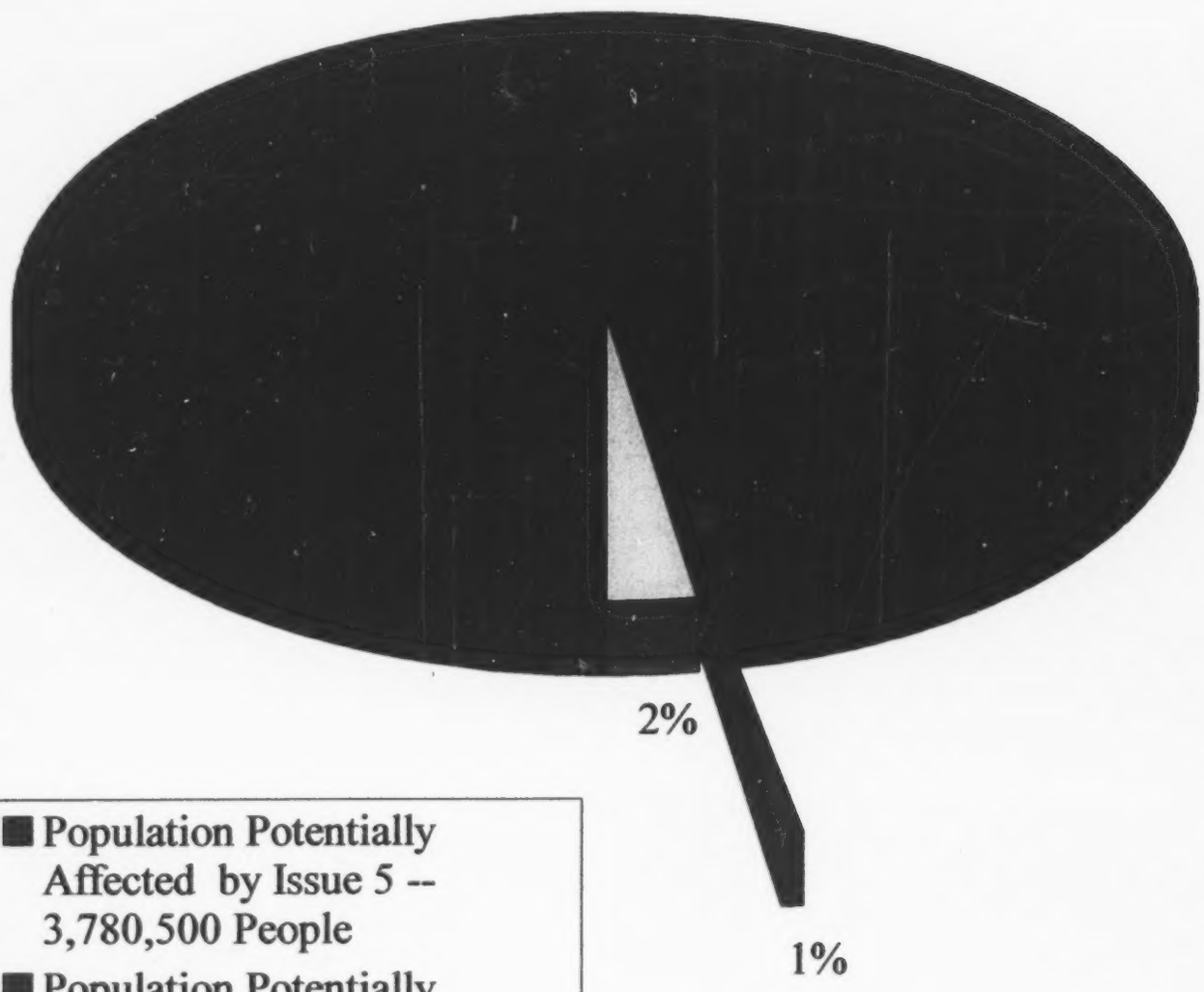
Areas Potentially Affected by Issue 5

Areas Potentially Affected by only Issue 4

Areas Unaffected by Issues 4 or 5

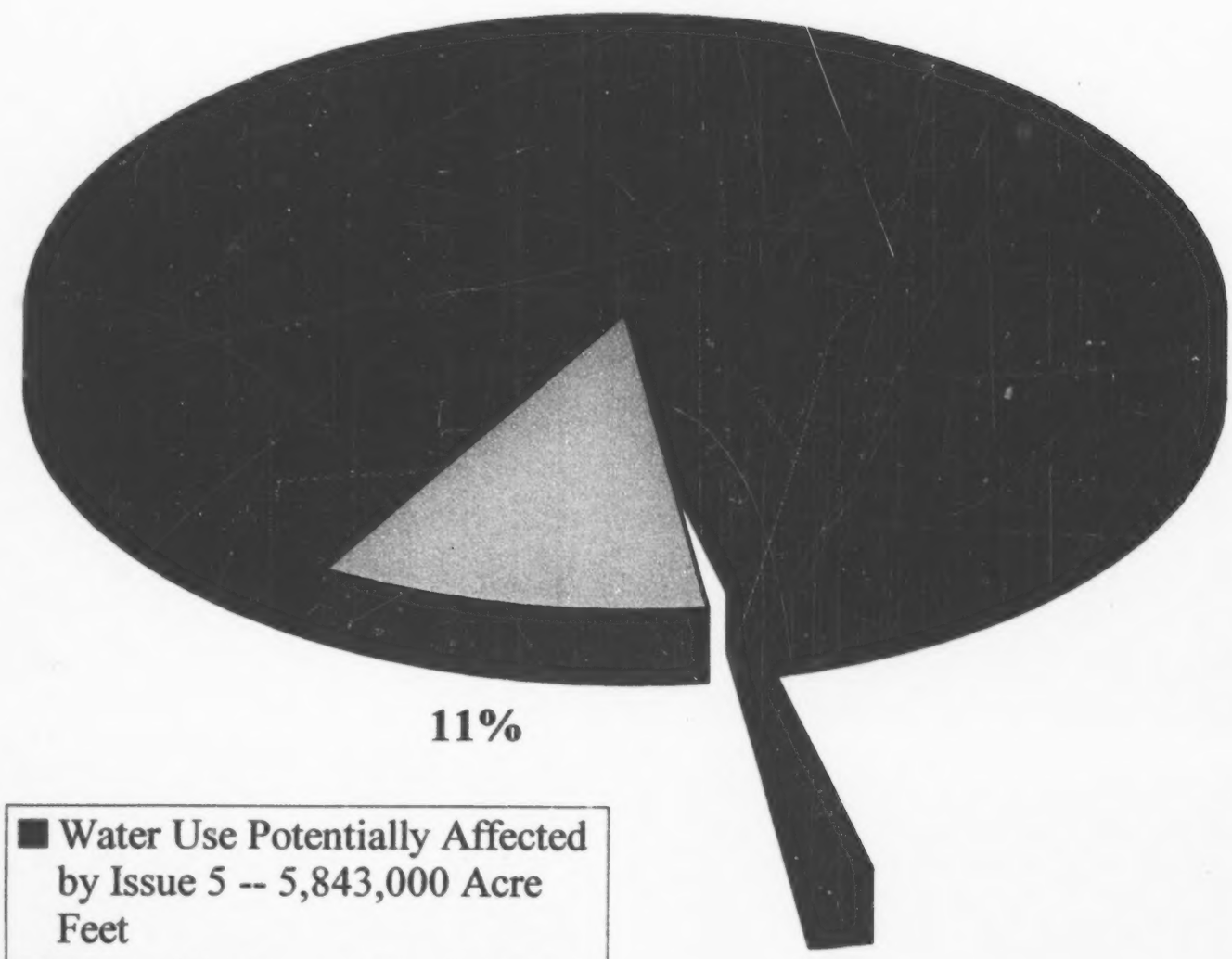
Map Base from ADWR Arizona Water Resources Assessment August 1994
Modifications and Determination of Regions by GRIC Office of Water Rights

Potential Impact of Issues 4 and 5 on Arizona's People


97%
2%
1%
Population Potentially Affected by Issue 5 -- 3,780,500 People
Population Potentially Affected by only Issue 4 -- 19,600 People
Population Unaffected by Issues 4 or 5-- 96,000 People

Data Compiled by the GRIC Office of Water Rights from the *Arizona Water Resources Assessment* By Arizona Department of Water Resources August,1994

Potential Impact of Issues 4 and 5 on Arizona's Water Use


87%
11%
2%
Water Use Potentially Affected by Issue 5 -- 5,843,000 Acre Feet
Water Use Potentially Affected by only Issue 4 -- 109,000 Acre Feet
Water Use Unaffected by Issues 4 or 5 -- 712,000 Acre Feet

Data Compiled by the GRIC Office of Water Rights from the *Arizona Water Resources Assessment* By Arizona Department of Water Resources August,1994

c. Petitioners also claim that the Arizona Supreme Court's decision warrants review because it is in conflict with the Wyoming Supreme Court's decision in *In re General Adjudication of All Rights to Use Water in the Big Horn River, supra.* See 99-1388 Pet. 28- 29; 99-1389 Pet. 11-12; Arizona Response 13. The Wyoming Supreme Court acknowledged that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." 753 P.2d at 99. It nevertheless ruled, contrary to that logic, that the reserved water doctrine "does not extend to groundwater." *Id.* at 100. The Wyoming Supreme Court reached that result because it could find no case expressly holding that federal reserved water rights extend to groundwater. See *id.* at 99-100.

The Arizona Supreme Court properly rejected the Wyoming Supreme Court's reasoning. The Arizona Supreme Court stated:

> We can appreciate the hesitation of the *Big Horn* court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so.

Pet. App. A17.[8] The Arizona Supreme Court has now provided a persuasive decision squarely holding that

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broadly, then the issue of whether federal reserved rights extend to percolating groundwater may turn out to be relatively unimportant.

[8] The Arizona Supreme Court also noted that there is more precedential support for its result than the *Big Horn* decision suggested. See Pet. App. A16 n.6, A17-A20 (discussing relevant cases).

the reserved water rights doctrine extends to groundwater. It is therefore possible that, if the Wyoming Supreme Court were faced with the issue again, it might well reconsider its decision and reach the "logical" outcome. At a minimum, the apparently divergent decisions of the Arizona Supreme Court and the Wyoming Supreme Court—which reflect the views of only two of the fifty States and have not yet resulted in any practical consequences for any water user—do not give rise to a mature conflict that would warrant this Court's review. Accordingly, even if the Arizona Supreme Court's decision were a final judgment for purposes of 28 U.S.C. 1257(a), it would not present a matter warranting this Court's review at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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ANDREW MERGEN
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Attorneys

MAY 2000